COPY

IN THE

Supreme Court of the United States

October Term, 1960

No. 765

ESTATE OF RALPH G. MAY,
MILDRED K. MAY, Executrix,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above-entitled case on November 2, 1960.

Opinions Below

The opinion of The Tax Court of the United States is reported at 32 T. C. 386. The opinion of the Court of Appeals, 283 F. 2d 853, is annexed hereto as Appendix A.

Jurisdiction

The judgment of the Court of Appeals was dated and entered November 2, 1960. Rehearing was denied on No-

vember 30, 1960. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1).

Questions Presented

Under the provision of the estate tax law allowing the marital deduction to a bequest of a life estate to the surviving spouse with power to appoint the corpus in her favor, is it necessary that the surviving spouse have in addition the power to dispose of the corpus in favor of others?

Statute Involved

The pertinent provision of the Internal Revenue Code of 1939 as amended by the Revenue Act of 1948, and as amended by the Technical Amendments Act of 1958 appears in Appendix B *infra*.

Statement of the Case

Petitioner seeks review of a judgment of the Court of Appeals for the Second Circuit affirming The Tax Court of the United States' denial of a marital deduction to petitioner. The facts were stipulated by the parties.(13-21)[1] and were duly found by the Tax Court as follows:

Ralph G. May died a resident of New York State on November 6, 1953; he was survived by his wife, Mildred K. May, who was then 51 years old. His will was duly admitted to probate in the Surrogate's Court of Erie County, and his wife appointed Executrix of his estate. Practically the entire estate of the decedent was disposed of by the residuary clause of his will, in the following terms:

[1] Reference is to the appendix to appellant's (petitioner here) brief in the Court of Appeals. Any reference herein to the appendices to this petition will be specifically identified.

> "THIRD: I hereby give, devise and bequeath to my wife, MILDRED K. MAY, should she survive me, the sole life use of all the rest, residue and remainder of my property both real and personal wherever situated with the right in the sole discretion of my said wife, to invade and use the principal not only for necessities but generally for her comfort, happiness and well-being. I direct that my said wife be given possession of said property and all thereof and that she be not required to give any bond or other security in respect thereto."

Paragraph FOURTH of said will provided a gift over at the death of his widow of the residue of such property—"if any there be"—for the benefit of then living children and issue.

The federal estate tax value of the property passing under Paragraph THIRD of the will was $245,657.68, all of which was included in the gross estate. In the estate tax return filed by the estate a marital deduction of $127,295.26 constituting one-half of the adjusted gross estate as shown by the estate tax return, was claimed. The respondent denied the deduction in an amount of $117,612.57, allowing only as a marital deduction the sum of $9,682.69 which represented the value of property which passed outside the will of the decedent to Mrs. May as her absolute property. This resulted in a tax deficiency of $34,971.01. The taxpayer petitioned the Tax Court for a redetermination of the deficiency (2-11).

The Tax Court, in a decision entered May 26, 1959, ruled against the petitioner and in favor of the respondent, determining a deficiency in the amount of $34,971.01 (31). The Tax Court likewise denied petitioner's motions to vacate its decision (31) and for reconsideration (32). Petitioner then appealed to the Court of Appeals for the

Second Circuit by a Petition for Review filed September 23, 1959, pursuant to §§ 7482 and 7483 of the Internal Revenue Code of 1954 (33-39). That Court, by a decision made and entered on November 2, 1960, affirmed the decision of the Tax Court. Thereafter, petitioner sought a rehearing and filed a petition therefor on the 16th day of November, 1960. This petition for rehearing was denied and a decision entered thereon on November 30, 1960.

The ultimate question to be decided is whether the residuary bequest to the widow of Ralph G. May qualifies for the marital deduction under Section 812(e) of the Internal Revenue Code of 1939 as amended by the Technical Amendments Act of 1958.

The basis for Federal jurisdiction in the court of first instance, The Tax Court of the United States, was Section 7442 of the Internal Revenue Code of 1954, 26 U. S. C. § 7442, Act of August 16, 1954, c. 736, 68A Stat. 879.

Reasons for Granting the Writ

This case presents an important question of Federal law which has not been, but should be settled by this Court, and the decision of the Court of Appeals below is in conflict with the decision of another Court of Appeals on the same matter.

Despite the fact that the marital deduction section of the estate tax law has been in effect since 1948 and has been the source of prolific litigation, this Court has decided but a single case under this important provision.[2]

The most troublesome problem to the lower courts has been interpretation of the provision which allows the mari-

[2] *Estate of Meyer v. United States*, ___ U. S. ___, 81 S. Ct. ___, 5 L. ed. 2d 161, decided November 21, 1960, involving a relatively narrow question concerning the proceeds of life insurance.

tal deduction when the surviving spouse is given the life interest in the income from property together with a power * * * exercisable in favor of the surviving spouse, or in favor of the estate of the surviving spouse, or in favor of either, whether or not in each case it is exercisable in favor of others * * *."[3]

This case presents the question of whether the above quoted statutory language requires the testator to grant to his surviving spouse the power to dispose of corpus in favor of others in addition to an unrestricted power to dispose of the corpus for her own benefit.

The Court of Appeals below has held that it does, and its decision is in conflict with the decision of the Court of Appeals of another circuit, and would appear to be contrary to the statutory language, purpose and structure. There are here present important continuing questions which are appropriate for authoritative determination by this Court.[4]

1. Conflict with decision of another Court of Appeals.

The decision of the Court below in this case is in conflict with the decision of the Court of Appeals for the 3rd Cir-

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[3] Section 812(e)(1)(F) of the Internal Revenue Code of 1939, as amended by the Technical Amendments Act of 1958; Section 2056(b)(5) of the Internal Revenue Code of 1954.

Restrictive construction by the Commissioner of Internal Revenue and lower courts has required the Congress to amend this provision repeatedly in order to carry out the purpose and the policy of the statute. Congress in 1954 revised this provision to place a legal life estate on the same footing as a beneficial interest in trust (§ 2056(b)(5) of the Internal Revenue Code of 1954). Congress in 1954 also revised this provision to allow a portion of the interest as distinguished from the entire interest to satisfy the requirements of this provision. (§ 2056(b)(5) of the Internal Revenue Code of 1954). Congress in 1958 amended the original law to make the above revisions retroactive. (Technical Amendments Act of 1958, § 93 amending § 812(e)(1)(F) of the Internal Revenue Code of 1939).

[4] The instant case arises under the Internal Revenue Code of 1939, but the Amendment of 1958 exactly conforms this provision of the 1939 Code to the provision of the 1954 Code. Therefore, this case presents a question of interpretation of presently existing law.

cuit in *Estate of Hoffman v. McGinnes*, 277 F. 2d 598 (1960), where a power "to use and spend any part or all of the principal that she may desire" was held to satisfy the statutory requirement.

That Court observed:

> "It would be difficult, if not impossible, to state any more explicitly an intent to confer 'an unrestricted power exercisable at any time during her life to use all or any part of' the principal of the decedent's trust estate."

The above observation would be no less applicable to the instant will where the surviving spouse was given a power "to invade and use the principal not only for necessities but generally for her comfort, happiness, and well-being."[5]

The confusion of the lower courts on this question is indicated by the following:

Originally The Tax Court of the United States held in a carefully reasoned opinion reviewed by the entire Court that "an unlimited power to consume principal of a trust satisfies the test of a power of appointment under section 812 (e)(1)(F)". (*Estate of Ellis v. Commissioner*, 26 T. C. 694 (1956)). However, the Court of Appeals for the 3rd Circuit reversed the Tax Court (252 F. 2d 109 (1958)). Thereafter, the Tax Court, apparently supposing

[5] In the *Hoffman* case, there was an expression "• • • upon her request or requests made to (trustees) they shall pay to her from time to time any part of the principal of my estate as she may desire and said trust shall cease as to that part of the principal so paid to her". There is no distinction between the *Hoffman* case and the instant case by reason of this expression. Such expression is appropriate to a trust as existed in the *Hoffman* case but would be inappropriate to a legal life estate as existed in the instant case. To make such a distinction would be an attempt to allow the marital deduction in the case of a trust but to disallow the marital deduction in the case of a life estate—the very thing that the 1954 revision of the marital deduction section and the Technical Amendments Act of 1958 intended to secure. See also, the New York Court of Appeals decision *In re Woollard's Will*, 295 N. Y. 390 (1946), precluding inquiry into the good faith of the donee's exercise of her power.

that the Court of Appeals for the 3rd Circuit had reversed on the question of whether an unlimited power to consume satisfied the marital deduction provision, changed its position in the instant case when it was before the Tax Court (32 T. C. 386). However, after the Tax Court's decision in this case, the Court of Appeals for the 3rd Circuit decided the *Hoffman* case, *supra*, allowing the marital deduction and distinguishing the *Ellis Estate* case where the power of consumption was restricted to the requirements of the surviving spouse and therefore not unlimited.

Contemporaneously with the decision of the Court of Appeals below in the instant case, the District Court for the Western District of New York, in a case involving a will governed by New York law, was deciding a case involving the same question and held that a power "to use any part of the principal" satisfied the marital deduction provision. (*Lincoln Rochester Trust Company, as administrator, c. t. a. of the Last Will and Testament of Albert E. Copeland v. United States*, decided October 18, 1960.) This opinion has not yet been reported and therefore a copy of the opinion is reproduced herein as Appendix C.

The Court of Appeals below relies on purported differences of state law to excuse different results in cases arising in other states. It attempts to "limit" an otherwise unlimited power by introducing local law prohibitions against waste or gifts to defeat remaindermen. The use of such purported differences which do not have an effect on taxing policy is contrary to Congress' expressed intention as stated in the Committee Report:

> "A 'power to appoint' the corpus includes any power which in substance and effect is such a power regardless of the nomenclature used in creating the power and local property-law connotations." (Sen. Rep. 1013, 80th Cong., 2d Sess., Part II, 1948-1 C. B. 285, 343).

2. Important Federal Question.

Very frequently a testator, seeking to provide for his surviving spouse, desires to give her the income from his estate together with the power to invade the corpus, without limitation, for her own benefit, but understandably does not wish to give her the power to dispose of the corpus in favor of other persons, such as her collateral relatives.

As is hereafter noted, it was the general intention of Congress to allow the marital deduction with respect to property over which the surviving spouse had a power of appointment sufficient to require the inclusion of such property in the estate of the surviving spouse. An unlimited power to consume (such as is here considered) is a "general power of appointment" requiring inclusion in the gross estate, even though the power does not permit disposition in favor of other persons (Section 811(f) of the Internal Revenue Code of 1939; Section 2041 of the Internal Revenue Code of 1954). The failure by the Court of Appeals to correlate these sections is more fully considered below.

Turning from these general observations to the specific language of the governing statute, it is difficult to see how Congress could have more precisely described the instant provision as qualifying for the deduction. The required power is defined as:

> "* * * power in the surviving spouse to appoint * * * (exercisable in favor of such surviving spouse, or of the estate of such surviving spouse, or in favor of either, whether or not in each case the power is exercisable in favor of others), * * * alone and in all events".[6]

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[6] Section 812(e)(1)(F) of the Internal Revenue Code of 1939, as amended by the Technical Amendments Act of 1958; Section 2056(b)(5) of the Internal Revenue Code of 1954.

For our purpose, the important words are "in favor of such surviving sponse * * * whether or not * * * the power is exercisable in favor of others * * *".

The section considers two cases: first, a power is within its provisions if it can be exercised in favor of the estate of the surviving spouse; and, second, a power is within the provisions if it can be exercised in favor of the surviving spouse herself "whether or not in each case the power is exercisable in favor of others".

Since Congress has specifically rejected any distinction between a life estate with an unlimited power to consume corpus and an unlimited power to appoint to oneself, by deleting the proposed sentence which would have made such a distinction in the Technical Amendments Act of 1958 as is hereafter noted, it seems beyond argument that the language of the present will comes squarely within the second class of cases specified above. Obviously one cannot appoint to oneself to take effect after death—such a case is the appointment "in favor of the estate of the surviving spouse" referred to in the first class. The right to appoint in favor of the surviving spouse obviously means an appointment exercised in her own favor during her lifetime, *i. e.*, the exact equivalent of an unlimited power to consume the corpus of a life estate, such as is here considered.

It was suggested by the Court below in the *Pipe* case,[7] and reiterated in its opinion in the instant case, that a surviving spouse must be able to appoint to herself during her lifetime in such a manner so as to be able to *devise* the property at death. Such a case, however, would be within the first class—that is, "in favor of the estate of the surviving spouse", and such an interpretation attaches no

[7] *Estate of Pipe v. Commissioner*, 241 F. 2d 210 (1956).

significance to the creation of the second class—appointment by the surviving spouse to herself. In the same way, the argument made by the Government that a surviving spouse must be able to give the property away to others during her lifetime imposes a requirement by indirection that the statute expressly disavows.

The legislative history of this provision also supports the Congressional purpose to permit an unlimited power to invade for the benefit of the surviving spouse (even though there is no power to give away the property to others) to qualify for the marital deduction. The House bill (which later became a part of the Technical Amendments Act of 1958) when it was passed by the House of Representatives contained the following sentence which is not present in the 1954 Code provision:

> "For the purpose of the preceding sentence, a power is exercisable in all events if the surviving spouse has the unrestricted power exercisable at any time during the life of such spouse to use all or any part of the property subject to the power, and *to dispose of it in any manner including the power to dispose of it by gift* (whether or not such spouse has power to dispose of it by Will)". (Italics added). (H. R. 8881).

This sentence was deleted by the Senate, and the House accepted such deletion in enacting the Technical Amendments Act of 1958. The instant case is controlled by the Technical Amendments Act of 1958, and nothing could indicate more clearly specific Congressional disapproval of a requirement that the surviving spouse be able to give away the property to others than this specific action by the Congress.

In 1958 the Commissioner of Internal Revenue added to his Regulations for the first time this very sentence which was rejected by the Congress. Regulation 20.2056(b)-5

(g)(3). Thus, the instant case involves the validity of a provision of a Regulation which was not added until ten years had elapsed from the enactment of the marital deduction provision, and which provision the Congress has specifically refused to enact into the statute.

The instant case also raises the important question of whether Congress intends that this provision of the marital deduction section be coordinated with the gross estate section concerning powers of appointment.

An unlimited power to consume corpus is a "general power of appointment" so as to require inclusion in determining the gross estate, even though the power does not permit disposition in favor of other persons.[8]

The Congressional Committee Reports with reference to this provision of the marital deduction section indicate an intended coordination between this marital deduction provision and the gross estate provision:

> "This provision is designed to allow the marital deduction for such cases where the value of the property over which the surviving spouse has a power of appointment will (if not consumed) be subject to either the estate tax or the gift tax in the case of such surviving spouse". (Sen. Rep. 1013, 80th Cong., 2d Sess., Part II, p. 16 (1948); 1948-1 C. B. 285, 342).
>
> * * *
>
> "A marital deduction is allowed in computing the taxable estate under present law for the value of property passing from one spouse to the other, if the surviving spouse has a right to the income from all of the property and has a general power of appointment over all of it. * * *
>
> "The House and your committee's bill make it clear that property in a legal life estate as well as property

[8] Section 811(f) of the Internal Revenue Code of 1939; Section 2041 of the Internal Revenue Code of 1954; Regulations 105, section 81.24; Regulations section 20.2041-1(c)(2).

in trust qualifies for the marital deduction and that a right to income plus a general power of appointment over only an undivided part of the property will qualify that part of the property for the marital deduction." (S. Rep. No. 1622, 83d Cong., 2d Sess., p. 125, 3 U. S. C. Cong. & Adm. News (1954) 4621, 4758).

Congress could have no fiscal or policy purpose in requiring as a condition of qualifying for the marital deduction that the surviving spouse be able to dispose of corpus in favor of others, in addition to an unrestricted power to consume corpus for her own benefit. From a fiscal point of view, it has been previously noted that an unrestricted power of consumption will require inclusion of the property in the surviving spouse's estate even though she does not have the power to dispose of the property in favor of others. From a policy point of view, it is evident that a right to income for life coupled with an unrestricted power to consume principal is of far greater value and benefit to the surviving spouse than is an income interest for life coupled with the mere power to appoint by will but without a right to enjoy the principal during lifetime. Yet the latter interest of the surviving spouse admittedly qualifies for the marital deduction. Congress could not logically have intended that the more valuable and beneficial former interest of the surviving spouse would not qualify for the marital deduction.

Thus, if the decision of the court below is allowed to stand without review by this Court, this anomalous result will subsist in conflict with the decision of the Court of Appeals for another Circuit.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT.

Estate of RALPH G. MAY, MILDRED K. MAY, Executrix,

Petitioner-Appellant,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent-Appellee.

No. 2, Docket 25944.

Argued Sept. 30, 1960.
Decided Nov. 2, 1960.

Albert R. Mugel, Buffalo, N. Y. (John G. Putnam, Jr., Jaeckle, Fleischmann, Kelly, Swart & Augspurger, Buffalo, N. Y., on the brief), for petitioner-appellant.

Harold M. Seidel, Washington, D. C. (Charles K. Rice, Asst. Atty. Gen., Lee A. Jackson, Robert N. Anderson, Attys., Dept. of Justice, Washington, D. C., on the brief), for respondent-appellee.

Before LUMBARD, Chief Judge, and TUTTLE* and FRIENDLY, Circuit Judges.

TUTTLE, Circuit Judge.

This petition for review tests the correctness of the decision of the Tax Court holding that a bequest by the tes-

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* Of the Fifth Circuit, sitting by designation.

tator, Ralph G. May, to his wife of the "sole life use of" the residuary estate "with the right in the sole discretion of my said wife to invade and use the principal not only for necessities but generally for her comfort, happiness and well-being" did not meet the requirements of the marital deduction provisions of the Internal Revenue Code.[1] We affirm the decision of the Tax Court.

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[1] Section 812(e)(1)(A)(B) and (F) of the Internal Revenue Code of 1939, as amended, 26 U. S. C. A. § 812(e)(1)(A, B, F), is as follows.

"Sec. 812. Net Estate.

"For the purpose of the tax the value of the net estate shall be determined, in the case of a citizen or resident of the United States by deducting from the value of the gross estate—

* * * * *

"(e) [As added by Sec. 361(a) of the Revenue Act of 1948, c. 168, 62 Stat. 110] Bequests, etc. to Surviving Spouse.—

"(1) Allowance of marital deduction.—

"(A) In General.—An amount equal to the value of any interest in property which passes or has passed from the decedent to his surviving spouse, but only to the extent that such interest is included in determining the value of the gross estate.

"(B) Life Estate or Other Terminable Interest.—Where, upon the lapse of time, upon the occurrence of an event or contingency, or upon the failure of an event or contingency to occur, such interest passing to the surviving spouse will terminate or fail, no deduction shall be allowed with respect to such interest—

"(i) if an interest in such property passes or has passed (for less than an adequate and full consideration in money or money's worth) from the decedent to any person other than such surviving spouse (or the estate of such spouse); and

"(ii) if by reason of such passing such person (or his heirs or assigns) may possess or enjoy any part of such property after such termination or failure of the interest so passing to the surviving spouse;

and no deduction shall be allowed with respect to such interest (even if such deduction is not disallowed under clauses (i) and (ii))—

"(iii) if such interest is to be acquired for the surviving spouse, pursuant to directions of the decedent, by his executor or by the trustee of a trust.

For the purposes of this subparagraph, an interest shall not be considered as an interest which will terminate or fail merely because it is the ownership of a bond, note, or similar contractual obligation, the discharge of which would not have the effect of an annuity for life or for a term.

* * * * *

"(F) [As amended by Sec. 93(a), Technical Amendments Act of 1958, P. L. 85-866, 72 Stat. 1606] Life Estate With Power of Appointment in Surviving Spouse.—In the case of an interest in property passing from the decedent, if his surviving spouse is entitled for life to all the income from the entire interest, or all the income from a specific portion thereof, payable annually or at more frequent intervals, with power in the surviving

(Footnote continued on following page)

The whole burden of petitioner's argument here is that the broad power given to Mrs. May to "invade and use the principal" is tantamount to a power to appoint the estate to herself and in favor of her estate. The Commissioner answers that under the applicable New York law such broad powers of invasion and use do not comprehend the right to either unrestricted prodigal use or to the assertion of complete ownership as including the ability to make a gift to others of any of the principal.

There is no real dispute as to the holding of the New York cases. Under them it is clear that a spouse, even with these broad powers of invasion and use, cannot appoint to herself. Matter of Briggs' Will, 101 Misc. 191, 167 N. Y. S. 632, modified 180 App. Div. 752, 168 N. Y. S. 597, affirmed 223 N. Y. 677, 119 N. E. 1032; Matter of Britt's Will, 272 App. Div. 426, 71 N. Y. S. 2d 405. This Court has given recognition to this legal proposition, albeit by dictum, in Matteson v. United States, 240 F. 2d 517. In that case the trial court had held that a broad power of invasion was, under New York law, limited by the exercise of good faith, and held that the spouse did not have the power to

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(Footnote continued from preceding page)

spouse to appoint the entire interest, or such specific portion (exercisable in favor of such surviving spouse, or of the estate of such surviving spouse, or in favor of either, whether or not in each case the power is exercisable in favor of others), and with no power in any other person to appoint any part of the interest, or such specific portion, to any person other than the surviving spouse—

"(i) the interest or such portion thereof so passing shall, for purposes of subparagraph (A), be considered as passing to the surviving spouse, and

"(ii) no part of the interest so passing shall, for purposes of subparagraph (B)(i), be considered as passing to any person other than the surviving spouse.

This subparagraph shall apply only if such power in the surviving spouse to appoint the entire interest, or such specific portion thereof, whether exercisable by will or during life, is exercisable by such spouse alone and in all events."

appoint to herself or to her estate. On appeal this Court decided the case on another issue. Nevertheless, the Court said:

> "To make not wholly fruitless the earnest presentation on the merits by counsel, perhaps somewhat decoyed by defendant's submission of the formal judgment, we say that examination of Judge Foley's careful analysis of the law and relevant decisions, state and federal, discloses no sound basis for upsetting his conclusions." 240 F. 2d 517, 519.

The taxpayer strenuously argues here that the result of this holding is too harsh to have been within the intent of Congress in adopting the marital deduction provision. From this it is argued, as a guide to the construction of Section 812(e)(1)(F), that since the provisions of Section 811(f)(3) are broad enough to make taxable in Mrs. May's estate this very power which she has to invade and use, such power should be held to be broad enough under Section 812(e)(1)(F) to satisfy the marital deduction requirement. We know of no rule of construction that permits the court to resort to legislative history or to other sections not necessarily correlated with the one under scrutiny to determine the meaning of language which is as clear as is that of Section 812(e)(1)(F).

It may well be that the entire residuary estate will, on Mrs. May's death, be a part of her taxable estate, even though she does not have the power to donate or appoint any part of it to any other person. This might result from the application of Section 811(f)(3) which may (although we do not so decide) define a general power of appointment broadly enough to include an unrestricted power to invade and use.

However, we think we need not speculate on whether Congress intended to equate the general power of appointment described in Section 811 with the "power in the surviving spouse to appoint * * * (exercisable in favor of such surviving spouse) * * * alone and in all events." We have already, in Pipe's Estate v. Commissioner, 2 Cir., 241 F. 2d 210, again by way of dictum,[2] construed the unlimited power to invade necessary to satisfy Section 811(f)(3) as requiring that the life tenant be able to devise the property. We held there what is equally plain here: that the power to invade at will does not comprehend the important power to appoint to the spouse or her estate.

Finally, as to the argument that the disallowance of a deduction for this bequest would be an unfair double tax on this residuary estate, we need only quote the answer given to this same argument in the Pipe's opinion:

> "Lastly, the appellant argues that the disallowance of a deduction for this bequest would frustrate the clear intent of Congress in enacting the marital deduction provisions in 1948. Citing extensive legislative history, e. g., S. Rep. No. 1013, 80th Cong., 2d Sess. (1948), the appellant points out that Congress sought a general uniformity of tax treatment of decedents' estates in both community property and common law states. The method adopted, in general, was to permit a deduction from the gross estate of the spouse who first deceased for the value of property that would be included, if not consumed, in the gross estate of the surviving spouse, thereby subjecting the value of that property so deducted to only one estate tax, which would be exacted at the survivor's death. Mrs. Pipe argues that the unconsumed principal of her life estate will be included in her gross estate for

[2] The Court held that a *legal* life estate could not qualify under the provisions of the Section as it then stood, but, then stating the assumption that the section was applicable to a legal life estate, the Court answered the precise question that is here before us.

federal tax purposes because of her unqualified power to invade the corpus during her lifetime. It is not necessary for us, however, to determine the validity of this contention, because the possibility of double taxation is not a sufficient basis for allowing a marital deduction if the bequest does not comply with the specific statutory requirements of section 812(e). Starrett v. Commissioner, 1 Cir., 1955, 223 F. 2d 163. *Cf.* Estate of Shedd v. Commissioner, 9 Cir., 1956, 237 F. 2d 345; Estate of Hoffenberg v. Commissioner, 1954, 22 T. C. 1185, affirmed *per curiam*, 2 Cir., 1955, 223 F. 2d 470. Here the appellant has failed to prove that this bequest falls within any of the express provisions for marital deductions under the 1939 Code." 241 F. 2d 210, 214.

The Third Circuit case of Commissioner of Internal Revenue v. Ellis' Estate, 3 Cir., 252 F. 2d 109, is in accord with what this Court said in Pipe's Estate v. Commissioner, *supra.* The later Third Circuit case, Hoffman v. McGinnes, 3 Cir., 277 F. 2d 598, is distinguishable on the ground that the Court found the will there before it for construction did in fact, under the Pennsylvania law, create a power in the spouse to appoint to herself. As we have said above, petitioner here does not dispute the Commissioner's contention that under New York law the May will cannot be so construed.

It may be appropriate to comment briefly on the contention of the petitioner here, as it was of the appellant in the Pipe's case, that the Court should not so construe this section as to make possible the achievement of different results depending upon the state in which the parties reside. It seems to us that this is merely an attempt to put the "cart before the horse." Section 812(e)(1)(F) makes it perfectly simple for any testator to make absolutely certain that his bequest will be considered as a marital deduc-

tion. All he has to do is to grant to the spouse "power * * * to appoint the entire interest, or [a] specific portion" in favor of herself or her estate, exercisable in all events, and that he grant no such power to any other person to appoint to any person other than the spouse. A will which contains a bequest for life to the wife expressly granting these powers has the same effect in any state in which the will is probated. There is, thus, complete uniformity if the statute is followed. The only occasion in which a lack of uniformity arises is when a testator's personal representative seeks to have the Court hold that something different from, or less than, the express requirements of the statute accomplish the same result. In such event the burden falls to the taxpayer to show that in *his* state the estate granted to the wife is, in law, indistinguishable from that which is set out in Section 812(e)(1)(F).

In Pennsylvania, as the Court of Appeals said in Hoffman v. McGinnes, *supra*, the courts have held that a bequest having powers somewhat broader than those contained in Mr. May's will gives the life tenant the power to obtain a transfer of the entire corpus of the estate, thus becoming the sole owner in fee. Thus, the net result is that a testator living in Pennsylvania can satisfy the language of Section 812(e)(1)(F) by the use of language which in New York State simply does not accomplish the same purpose. We think it is not a construction giving unequal effect to the taxing acts for us to construe the language of this section in such manner as to require literal compliance with the statute, which is simple, or creating an estate which in the state of administration places the parties in exactly the same legal position as they would occupy if the statute had been literally complied with.

The decision of the Tax Court is affirmed.

APPENDIX B

Internal Revenue Code of 1939:

SEC. 812. NET ESTATE

For the purpose of the tax the value of the net estate shall be determined, in the case of a citizen or resident of the United States by deducting from the value of the gross estate—

* * * *

(e) [As added by Sec. 361(a) of the Revenue Act of 1948, c. 168, 62 Stat. 110] *Bequests, Etc., to Surviving Spouse.*—

(1) *Allowance of marital deduction.*—

(A) *In General.*—An amount equal to the value of any interest in property which passes or has passed from the decedent to his surviving spouse, but only to the extent that such interest is included in determining the value of the gross estate.

(B) *Life Estate or Other Terminable Interest.*—Where, upon the lapse of time, upon the occurrence of an event or contingency, or upon the failure of an event or contingency to occur, such interest passing to the surviving spouse will terminate or fail, no deduction shall be allowed with respect to such interest—

(i) if an interest in such property passes or has passed (for less than an adequate and full consideration in money or money's worth) from the decedent to any person other than such surviving spouse (or the estate of such spouse); and

(ii) if by reason of such passing such person (or his heirs or assigns) may possess or enjoy any part of such property after such termination or failure of the interest so passing to the surviving spouse;

and no deduction shall be allowed with respect to such interest (even if such deduction is not disallowed under clauses (i) and (ii))—

(iii) if such interest is to be acquired for the surviving spouse, pursuant to directions of the decedent, by his executor or by the trustee of a trust.

For the purposes of this subparagraph, an interest shall not be considered as an interest which will terminate or fail merely because it is the ownership of a bond, note, or similar contractual obligation, the discharge of which would not have the effect of an annuity for life or for a term.

* * * * *

(F) [As amended by Sec. 93(a), Technical Amendments Act of 1958, P. L. 85-866, 72 Stat. 1606] *Life Estate With Power of Appointment in Surviving Spouse.*—In the case of an interest in property passing from the decedent, if his surviving spouse is entitled for life to all the income from the entire interest, or all the income from a specific portion thereof, payable annually or at more frequent intervals, with power in the surviving spouse to appoint the entire interest, or such specific portion (exercisable in favor of such surviving spouse,

or of the estate of such surviving spouse, or in favor of either, whether or not in each case the power is exercisable in favor of others), and with no power in any other person to appoint any part of the interest, or such specific portion, to any person other than the surviving spouse—

(i) the interest or such portion thereof so passing shall, for purposes of subparagraph (A), be considered as passing to the surviving spouse, and

(ii) no part of the interest so passing shall, for purposes of subparagraph (B)(i), be considered as passing to any person other than the surviving spouse.

This subparagraph shall apply only if such power in the surviving spouse to appoint the entire interest, or such specific portion thereof, whether exercisable by will or during life, is exercisable by such spouse alone and in all events.

* * * * *

(26 U. S. C. 1952 ed., Sec. 812.)

APPENDIX C.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

LINCOLN ROCHESTER TRUST COMPANY, as Administrator, c. t. a., of the Last Will & Testament of Albert E. Copeland, deceased,

Plaintiff.

vs.

THE UNITED STATES OF AMERICA,

Defendant.

Civil No. 7510.

Nixon, Hargrave, Devans & Dey, Rochester, N. Y., Attorneys for Plaintiff; Scott Stewart, Jr., and Sterling L. Weaver, of counsel.

Neil R. Farmelo, United States Attorney, for the Defendant; Charles K. Rice, Assistant Attorney General, James P. Garland, David A. Wilson and Robert W. Kernan, Attorneys of Department of Justice, of counsel.

This is a suit for refund of $14,055.22, with interest, paid as a deficiency assessment on the Federal Estate Tax by the estate of Albert E. Copeland. The question is whether the estate is entitled to a marital deduction under Sec. 812(e)(1)(F) of the 1939 Internal Revenue Code, as amended, by reason of a provision of the decedent's Will, devising to his widow a life estate with the right to use any part of the principal thereof.

Appendix C.

The case was submitted on a written stipulation of facts, which facts are determined to be findings of fact herein.

The decedent died September 26, 1950. His Will provides in part as follows:

> "SECOND: I give, devise and bequeath to my wife, Jenny Morris Copeland, in case she survives me, the life use of all the rest, residue and remainder of my estate, both real and personal, wherever the same may be situated, with the right to use any part of the principal thereof.
>
> "THIRD: I give, devise and bequeath Thirty-five Per Cent (35%) of the residue of my estate, after the death of my said wife, or in case my said wife shall predecease me, to each of my sons Morris A. Copeland and Arthur H. Copeland.
>
> • • •
>
> "FIFTH: I direct that Thirty Per Cent (30%) of the residue of my estate, after the death of my said wife, or in case my said wife shall predecease me, shall be held by my executor, or executors, for the benefit of such of my grandchildren as may survive both my said wife and me, share and share alike, • • •."
>
> • • •

The Surrogate's Court of Monroe County in a proceeding to construe the Will held "that the purpose and effect of the said paragraph second of the decedent's Last Will and Testament was to give to Jenny Morris Copeland the life use of all of the residuary estate with an unlimited right to consume any or all of the principal thereof, • • •."

Plaintiff contends that the bequest to the decedent's widow of the life use of the residuary estate coupled "with the right to use any part of the principal thereof" satisfies the provisions of Sec. 812(e)(1)(F) of the Internal

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Revenue Code of 1939, as amended by the Technical Amendments Act of 1958 (P. L. 85-866, 72 Stat. 1606) and that, therefore, a marital deduction is allowable. The Government contends that the bequest does not qualify for the marital deduction, it being a terminable interest under Sec. 812(e)(1)(A) for which no deduction is allowable.

Sec. 812(e)(1)(F) as amended by the Technical Amendments Act of 1958 provides that an interest in property passing from the decedent to a surviving spouse under the terms of which she is entitled for life to all the income from the entire interest, or all the income from a specific portion thereof and has a power to appoint the entire interest or such specific portion in her favor or in favor of her estate, will be considered as passing to the surviving spouse within the meaning of Sec. 812(e)(1)(F), provided the power is exercisable by will or during life and is exercisable by such spouse alone and in all events. In such case the interest passing will not be considered a terminable interest under the provisions of Sec. 812(e)(1)(B).

The Government argues that the power given to the surviving spouse was, at most, a power to use and consume the principal for her own benefit, that it was not a power under which she could appoint unconsumed principal to herself or dispose of it to others of her own selection.

House Report No. 1027, 85th Congress, 1st Session, accompanying the amendment of Sec. 812(e)(1)(F) of the Internal Revenue Code of 1939 (Technical Amendments Act of 1958)* under the heading "Explanation of the Bill" reads in part as follows:

*N. B. (added by Petitioner). This Committee Report accompanied H. R. 8881, referred to on page 10 hereof, rather than the Technical Amendments Act of 1958, which was H. R. 8381.

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"In addition, the last sentence of subsection (a) of the bill provides that a power exercisable in all events includes an unrestricted power exercisable by the surviving spouse at any time during her life to use all or part of the property subject to the power, where the power includes the right to dispose of the property in any manner (including the power to dispose of it by gift), but such right does not have to include the power to dispose of the property by will. The purpose of this concluding sentence is to describe the general conditions under which the right of the surviving spouse to use, consume, or invade the property during life is the equivalent of the right to dispose of it by will and therefore the equivalent of a general power of appointment. This provision is intended to insure that the marital deduction will be allowed in cases where the property subject to the power would be includible in the gross estate of the spouse upon her death. Thus, where the spouse has a power to consume, invade, or appropriate the property, and she is the sole judge of what the invasion, consumption, or appropriation is needed for, such a power is intended to come within this provision. For example, if the surviving spouse has, in addition to a life interest, the unrestricted right, in her sole discretion, to invade and use the property generally for her comfort, happiness and well being, such a power would meet the test prescribed by the last sentence of subsection (a) even though there is no separately stated power to dispose of the property. These broad powers in the surviving spouse to use, consume, or invade give the spouse an interest equivalent to a general power of appointment, which makes the property includible in the spouse's gross estate upon death. From this it follows that the marital deduction is allowable with respect to such a property interest. This is the result under the 1954 Code and the bill makes it clear that it is to be the result under the 1939 Code."

Thus, Congress has expressed the intent as to the nature of the unlimited power to invade required to comply with

the terms of the statute. This can only mean that a broad power to invade during life is the equivalent of a general power of appointment exercisable by Will and is sufficient to qualify for the marital deduction. The surviving spouse in the instant case has an unlimited right to consume any and all of the principal. This is at least as broad a power to invade as was contained in the example cited in House Report No. 1027, *viz.*, "the unrestricted right, in her sole discretion to invade and use the property generally for her comfort, happiness and well being." Thus, it meets the test prescribed by the last sentence of subsection (a) of the Technical Amendments Act of 1958.

Estate of Pipe v. Commissioners, (2 Cir. 1957), 241 F. 2d 210, held that, where the decedent's will gave the residuary estate to his wife for life with power to use the income and principal during her life in her uncontrolled discretion but without power to make testamentary disposition of the part which remained unexpended at her death, the bequest did not qualify for the marital deduction. This case was decided February 7, 1957, before the enactment of the Technical Amendments Act of 1958 and before August 7, 1957, the date of House Report No. 1027. For that reason I do not consider the case as controlling.

My conclusion is, therefore, that the life estate in the instant case qualifies for the marital deduction under the statute as amended, and that the plaintiff is entitled to judgment.

Settle judgment on notice.

October 18, 1960.

HAROLD P. BURKE,
U. S. District Judge.